

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/05-01/13

Date: 17 April 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU and NARCISSE ARIDO***

Confidential

**Observations of the Registrar on requests ICC-01/05-01/13-857-Conf
and ICC-01/05-01/13-867-Conf**

Source:

Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta

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REGISTRY

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Mr Herman von Hebel

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Victims and Witnesses Unit

Detention Section

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THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT (THE "COURT"),

NOTING the Registrar's decision of 10 March 2015 on allocation of resources during trial phase¹ (the "impugned decision");

NOTING the Narcisse Arido's Request for Review of the Scope of the Registry's Decision on the Allocation of Resources during Trial Phase dated 10 March 2015 Pursuant to Regulation 83 (4) of the Regulations of the Court² (the "Arido request") and the Defence Request to the Trial Chamber for Review of the Registrar's Decision of 10 March 2015 on the Allocation of Resources during Trial Phase³ (the "Mangenda request"), cumulatively referred to as the "requests" unless otherwise indicated;

CONSIDERING articles 43, 67 and 70 of the Rome Statute, rules 20 and 21 of the Rules of Procedure and Evidence, regulations 23bis, 24bis, 33, 34 (b) and 83 of the Regulations of the Court, regulations 130 and 133 to 136 of the Regulations of the Registry, and the instructions from Trial Chamber VII (the "Chamber") to respond to the Arido request⁴;

NOTING the extension of time-limit granted to the Registrar⁵ to file his response by 17 April 2015;

CONSIDERING the Court's legal aid policies, as codified in the Registry's single policy document on the Court's legal aid system (the "LAP");⁶

CONSIDERING that the jurisprudence of the Court has confirmed that the primary responsibility for managing the legal assistance scheme of the Court is vested upon the Registrar⁷;

¹ ICC-01/05-01/13-857-Conf-AnxA.

² ICC-01/05-01/13-857-Conf (2015-03-19).

³ ICC-01/05-01/13-867-Conf (2015-03-25).

⁴ E-mail communications from the Legal Officer of the Chamber, 2015-03-23 and 2015-03-26.

⁵ E-mail communication from the Legal Officer of the Chamber, 2015-04-08.

⁶ ICC-ASP/12/3.

CONSIDERING that the Presidency of the Court has consistently recalled

“that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached”⁸;

RESPECTFULLY SUBMITS the following observations:

I. THE REGISTRAR DULY CONSIDERED ALL APPLICABLE LEGAL TEXTS

1. The similarity in the core of the requests justifies a consolidated response as both submit that the Registrar abused his discretion in the legal assistance decision-making process by not applying the LAP⁹. Counsel for Mr. Mangenda opines that the impugned decision

“offers no explanation for having disregarded the [LAP]; identifies no criteria for determining the quantum of funding, while ignoring obvious and important relevant factors; refers repeatedly to irrelevant and improper considerations; and in its methodology and result, violates Mr Mangenda’s rights under Articles 55 and 67 of the Statute [...]”.¹⁰

⁷ ICC, Presidency, 2007-06-29, *Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively*, ICC-01/04-01/06-937, par. 16; ICC, Presidency, 2007-05-02, *Decision of the Presidency upon the document entitled “Clarification” filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007*, ICC-01/04-01/06-874, par. 17 and ICC, Presidency, 2014-02-06, *Public redacted version of Decision on the “Defence application to the Presidency for judicial review of the Registrar’s Decision on legal assistance of 20 December 2013” Dated 6 February*, ICC-RoC85-01/13-7-Conf-Exp, ICC-RoC85-01/13-7-Red, par. 48.

⁸ ICC, Presidency, 2005-12-20, *Decision on the application to review the Registrar’s decision denying the admission of Mr. Ernest Midagu Bahati to the List of Counsel*, ICC-Pres-RoC72-02-05, par. 16; ICC, Presidency, 2008-07-10, *Reasons for the “Decision on the ‘Application for review of decision of the Registrar’s Division of Victims and Counsel dated 2 January 2008 not to admit Prof. Dr. Sluiter to the List of Counsel’”*, ICC-Pres-RoC72-01-8-10, par. 20, as well as ICC, Presidency, 2009-02-25, *Decision filing a public redacted version of the “Decision on the ‘Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court’”*, ICC-RoC85-01/08-4.

⁹ Arido request, par. 23; Mangenda request, par. 25.

¹⁰ Mangenda request, par. 1.

2. Likewise, Counsel for Mr. Arido contests the Registrar's authority in defining the scope of the legal aid, stating "that the Registry abused its discretion by providing a budget which does not permit to give full effect to Mr Arido's fair trial rights"¹¹, such as "adequate time and facilities for the preparation of his defence and to present evidence"¹²; the right to an expeditious trial¹³ and equality of arms¹⁴. The defence alleged that Registry "significantly departed from LAP and RoC"¹⁵ while the "LAP does not provide for a separate standard for Article 70 cases"¹⁶. The Arido request claims that "the legal aid decision failed to take into account the workload faced by the defence"¹⁷; "gave undue weight to the diminution of the charges at the confirmation stage and that the trial budget was to start as of the date of its Decision on the trial budget"¹⁸.

3. The Registrar's obligation to determine the costs that are reasonably necessary for an effective and efficient defence, enshrined in regulation 83 (1) of the Regulations of the Court, is the standard by which resources are allocated to every defence team operating under the legal assistance scheme of the Court. The LAP is, in this regard, a "reference document" whose application is not automatic, as is exemplified by the pre-trial phase in the present case, where resources were allocated below the LAP level and no defence team successfully challenged this decision taken by the Registrar¹⁹. In two instances Pre-Trial Chamber II agreed with

¹¹ Arido request, par. 24.

¹² *Ibid.*, par. 43

¹³ *Ibid.*, par. 48-51.

¹⁴ *Ibid.*, par. 52-55.

¹⁵ *Ibid.*, par. 32-37.

¹⁶ *Ibid.*, par. 30-31.

¹⁷ *Ibid.*, par. 7.

¹⁸ *Ibid.*, par. 56-66.

¹⁹ ICC, Pre-Trial Chamber II, 2014-04-25, *Decision on the "Requête en application de la norm [sic] 83.4 du règlement de la Cour*, ICC-01/05-01/13-365-Conf and ICC, Pre-Trial Chamber II, *Decision on the "Narcisse Arido's request for review of the Registrar's decision on legal assistance paid by the Court dated 17 April 2014 (CSS/2014/269)"*, ICC-01/05-01/13-415-Conf-Exp.

the approach of the Registry stating with regard to the Arido Defence application for review, that

“in no way it can be said that in his Decision ‘the Registrar committed an error of law by unreasonably departing from Legal Aid Policy ... and also erred by failing to take into account relevant information as required by Regulation 83(1) of the RoC’”²⁰

and, in the case of Mr. Mangenda’s application for review, further precised that

- “(i) the determination of the means was not arbitrary but was pre-discussed within the competent units of the Registry in light of the upcoming article 70 case;
- (ii) that the determination took in account that an Article 70 proceedings had to be considered different, less complex, to proceedings for crimes under article 5 of the Statute; and
- (iii) that the Defence, while expressing general dissatisfaction with the sum accorded, does not present any specific and motivated arguments to the contrary and that the determination of the Registrar on the means of legal aid is never final but can, upon request and given good cause, be adjusted”²¹.

4. At the time of the confirmation of charges, the Registry proactively proceeded to consult, first, within the Registry and thereafter with the defence teams affected, having arrived to the conclusion that €22 000 per month should be a reasonably necessary sum to ensure the effective and efficient defence of each client. This sum (230 per cent of the €9 542 allocated during pre-trial phase) is also substantially superior to the total of USD50 000 allocated by the International Criminal Tribunal for Rwanda in a case of contempt brought before it²².

5. The impugned decision offers sufficient legal and factual motivation to its determination of the current defence needs and provides sufficient resources to cover all existing or reasonably foreseeable factors on the date it was issued on the basis of the legal aid principles enshrined in paragraph 9 of the LAP. In particular,

²⁰ ICC-01/05-01/13-415-Conf-Exp, *cit.*, at page 5.

²¹ ICC-01/05-01/13-365-Conf, *cit.*, at page 5.

²² ICTR, Appeals Chamber, 2010-03-15, Judgment in the case of *Léonidas Nshogoza v. The Prosecutor* (case no. ICTR-2007-91-A), in particular par. 29-41.

the principles of objectivity and economy bind the Registrar to allocate resources only when needs arise or when there are objective indications of those needs. A thorough assessment of the information submitted by both defence counsels after meeting the Counsel Support Section of the Registry did not establish any objective parameters to conclude that the scope of the legal aid should have been further enlarged²³, and neither request provide specific objective circumstances known on the date when the impugned decision was issued that were not duly taken into consideration²⁴.

II. THE REGISTRAR TOOK INTO ACCOUNT ALL AVAILABLE RELEVANT INFORMATION

A) The number and length of documents filed during pre-trial phase are irrelevant

6. The requests invoke²⁵ the activity level of the pre-trial phase as an indicator of the workload of the case during the trial phase. This activity level was considered in the framework of the preparation of the impugned decision, but it was deemed that it did not constitute an indicator of the workload to be expected during the trial phase given the high portion of issues discussed which are no longer relevant, in particular because of their having strictly a procedural character. The impugned decision also incorporated the consideration of the general dimensions of the disclosed material mentioned by the defence counsels during the respective meetings and in subsequent submissions – which were sometimes inconsistent²⁶ –, and did not indicate a substantive surge in disclosures or material litigation requiring a higher scope of the legal assistance paid for by the Court.

²³ In line with this approach, the Single Judge clearly determined that, “as underlined also in the [Arido] Request for review, ‘the legal assistance scheme was established for those suspected of crimes under Article 5 of the Statute and not for those suspected of crimes under Article 70 of the Statute’” (ICC-01/05-01/13-415-Conf-Exp, *cit.*, at pages 4-5); with regard to the Mangenda Request for review, see *supra*, par. 3 of the present Observations.

²⁴ Mangenda request, par. 1, 21 and 29.

²⁵ E.g., Arido request, par. 49.

²⁶ Impugned decision, par. 4.

B) The number of counts was duly taken into account

7. In the preparation of the impugned decision, the Registrar took as well into consideration other factors such as the comparison between the *Document Containing the Charges*²⁷ and the *Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute*²⁸ which established an important decrease of the charges against all defendants.²⁹ The number of counts is without a doubt an objective parameter that the Registrar must take into consideration when determining the resources which are reasonably necessary for the defence, as he did in the instant case.

C) The Registrar could not consider information not available at the time

8. Counsel for Mr Mangenda states that the Registrar has not identified a certain number of "objective", relevant indicators of workload whose expected dimension is quantified in his request, such as the disclosure of documents, including telephone call transcripts, the number of Prosecution exhibits and the number of Prosecution witnesses³⁰.

9. All these indicators, as well as other relevant statements not reproduced by the requests, have first come to light in, and taken by Counsel for Mr Mangenda from, the *Prosecution's Observations on the Agenda of the First Status Conference*³¹ submitted on 20 March 2015, so they could not be taken into account in the preparation of a decision issued ten days before.

10. The Defence should, before submitting its request to the Chamber based on this information, have given the Registrar the opportunity to make an assessment of its incidence in the team's workload and it should have therefore

²⁷ ICC-01/05-01/13-526-AnxB1-Red (2014-07-04).

²⁸ ICC-01/05-01/13-749 (2014-11-11).

²⁹ Impugned decision, par. 5.

³⁰ Mangenda request, par. 15.

³¹ ICC-01/05-01/13-859-Conf (2015-03-20).

submitted a request for additional resources, pursuant to regulation 83 (3) of the Regulations of the Court, before requesting the Chamber the review of a decision which, in fact, has never been taken.

III. THE REQUESTS FAIL TO SHOW THE NEED FOR THE REQUESTED FUNDING

11. The requests challenge the impugned decision on the grounds that it did not follow the LAP, but do not offer any arguments why the assessment of the Registrar was incorrect. The Registrar remains of the view that a highly qualified counsel can use the available resources in an optimal way to ensure that all the needs of the client's representation are duly met; the principle of flexibility allows them to consider several different scenarios, in particular where one or several team members work in different part-time modalities. The following table offers some examples of such possibilities:

Team member	Scenario 1		Scenario 2		Scenario 3		Scenario 4	
Counsel	50%	5,343.50	75%	8,015.25	50%	5,343.50	100%	10,687.00
Associate counsel	50%	4,521.50	50%	4,521.50	50%	4,521.50	65%	5,877.95
Legal assistant	100%	5,622.00	75%	4,216.50	75%	4,216.50	20%	1,124.40
Case manager	100%	4,570.00	75%	3,427.50	75%	3,427.50	80%	3,656.00
Expenses		1,943.00		1,819.25		4,491.00		654.65
Total		22,000.00		22,000.00		22,000.00		22,000.00

12. Contrarily to what is stated in the requests³², the Registrar reiterates that the position of an associate counsel, whose presence may sometimes be relevant in the course of the proceedings, does not warrant his or her full-time intervention. The Registry's past practice confirms that this is not necessary.

³² E.g., Arido request, par. 44; and, Mangenda request, par. 23.

IV. THE REGISTRY CAN PROVIDE *AD HOC* ADDITIONAL SERVICES AND RESOURCES WHERE THEY ARE JUSTIFIED

13. Paragraph 9 of the impugned decision expressly recalls the possibility of obtaining additional resources where their allocation is justified on the basis of the principles of continuity and flexibility,³³ developed in paragraphs 66 to 76 of the LAP, which is in harmony with a prior finding of Pre-Trial Chamber II³⁴. It is the responsibility of Counsel to manage the allocated resources within the margins set by the Court and to present the appropriate request when the circumstances are met.

14. Regarding translation and interpretation issues³⁵, both Counsels have the option to benefit, without any incidence on their respective budget, from the assistance of the Court Interpretation and Translation Section. The Registry has not yet received any such request nor has it been offered an indication of the potential needs that each team would have in this regard.

15. Such lack of information on the foreseeable workload makes it impossible for the Registrar to make an appropriate assessment on the matter; reference is therefore made to the aforementioned possibility of requesting additional resources as the situation unfolds.

16. Counsel for Messrs. Arido and Mangenda may, in addition, avail themselves of the assistance of the Office of Public Counsel for the defence under its mandate defined in regulation 77 of the Regulations of the Court. Teams can also benefit from the Courts Internships and Visiting Professionals programme as well as the *pro bono* membership system established by the Registry where highly qualified lawyers can intervene in a team without additional costs to the budget.

³³ LAP, par. 9.

³⁴ The Single Judge considered that "the determination of the Registrar concerning the legal aid is not a final decision, therefore the request can be renewed and the [Registrar's] decision can adjusted given a good cause" (ICC-01/05-01/13-415-Conf-Exp, *cit.*, p. 5, repeated *verbatim* in ICC-01/05-01/13-365-Conf, *cit.*, at page 5.

³⁵ Arido request, par. 23, 35 and 60; and Mangenda request, par. 20 and 25.

V. THE IMPUGNED DECISION COULD NOT BE RETROACTIVE

17. Decisions of the Registrar on matters of legal assistance, including on the scope of resources, must be based on a rationalised assessment of the actual workload expected by the defence, in light of the principle of objectivity³⁶.

18. While future workload may also be taken into account in such an assessment, provided that valuable information to this effect are available, this cannot be done for the past; in particular, in a context where past activities have not had such an impact as to warrant the immediate increase of resources, such as the appointment of an associate counsel. In fact, the resources for this post were never requested by any of the two counsels since the date the requests claim as the commencement of the impugned decision's effects.

19. Therefore, the impugned decision cannot deploy its effects from the date of constitution of the Trial Chamber, *i.e.* 30 January 2015 at the latest, as the requests submit³⁷.

VI. LEVEL OF CLASSIFICATION

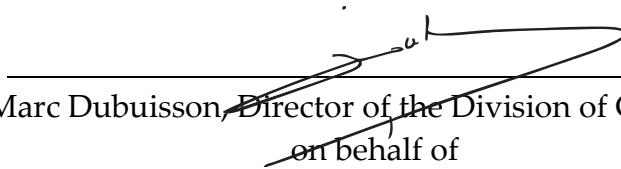
20. Pursuant to regulation 23*bis* of the Regulations of the Court, the present document is classified as "confidential", as it follows the classification of the requests. The Registrar has however no objections to a re-classification as public or the release of a redacted version thereof, should the Chamber instruct him to do so.

³⁶ LAP, par. 9.

³⁷ Arido request, par. 63ff. and, Mangenda request, par. 27.

THE REGISTRAR REMAINS at the disposal of the Chamber, should further assistance on this matter be required.

RESPECTFULLY SUBMITTED.



Mr. Marc Dubuisson, Director of the Division of Court Services
on behalf of
Mr. Herman von Hebel, Registrar

Dated this 17 April 2015

At The Hague, The Netherlands